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No. 04-495

IN THE

Supreme Court of the United States

REGINALD A. WILKINSON, DIRECTOR,
OHIO DEPARTMENT OF REHABILITATION
AND CORRECTION, ET AL.,
Petitioners,

v.

CHARLES E. AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF PERCY PITZER, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[*]

Amicus served as an employee of the Federal Bureau of Prisons for over twenty-five years. From 1987 to 1989, he served as Manager of the Long Term Control Unit at the United States Penitentiary at Marion, Illinois. At that time, the Control Unit was the most restrictive prison setting in the entire federal correctional system. *Amicus* currently consults and provides expert testimony regarding corrections security and management throughout the country.

SUMMARY OF THE ARGUMENT

The lower federal courts in this case have ordered Ohio to run its super-max facility essentially the same way we ran the Control Unit at Marion. Procedural protections such as notice, hearings, written decisions, and specific criteria for exit from the Control Unit are neither burdensome nor unwieldy. These procedures also advance important correctional goals by allowing inmates and correction staff to know, understand, and accept their respective roles and responsibilities within the unit. They worked at Marion, and they will work in Ohio.

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[*] Counsel for all parties have consented in writing to the filing of this brief, and *amicus* has filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amicus* and his counsel, has made a monetary contribution to this brief's preparation and submission.

ARGUMENT

As is well known, the United States Penitentiary at Marion, Illinois, was created in 1963 to replace the USP at Alcatraz, California. *See generally Marion – 1985: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong. 26 (1985). It was built to house approximately 500 high-security inmates. Ten years later, the Long Term Control Unit was created within Marion to house approximately 50 to 60 inmates considered to be too dangerous to keep in the general population of any correctional facility—the worst of the worst. *Id.* at 357-58.

The Control Unit was the first super-maximum security (or "supermax") facility in the country.[1] Until the Administrative Maximum Unit at Florence, Colorado, was opened in 1994, the Control Unit at Marion was the most restrictive facility in the federal system and the one of the most restrictive units in the nation. *See* Comm. to End the Marion Lockdown, *From Alcatraz to Marion to Florence—Control Unit Prisons in the U.S.* (1992), *at* www.unix.oit.umass.edu/~kastor/ceml_articles/cu_in_us.html (last visited March 1, 2005). *Amicus* was manager of this unit from 1987 to 1989.

[1] Today, "supermax" facilities go by many names including extended control units (ECUs), special housing units (SHUs), special management units (SMUs), intensive management units (IMUs), and maxi-maxis. *See* William C. Collins, U.S. Dep't of Justice, Nat'l Inst. of Corr., *Supermax Prisons and the Constitution: Liability Concerns in the Extended Control Unit*, at 5-6 (2004). Despite the differences in nomenclature, all such institutions share a common purpose—to remove the most dangerous offenders from the general population. *Id.*

I. The Process Extended To Federal Inmates Prior To Assignment In the Control Unit at USP Marion Was Equivalent To That Contemplated By The Lower Courts In This Case

Inmates came to the Control Unit from institutions throughout the federal system. These inmates were never assigned to the Control Unit by chance, nor were they sent to the Control Unit directly from sentencing. On the contrary, during my tenure at Marion, inmates arrived at the Control Unit only after a comprehensive procedure instituted by the BOP to guarantee order and stability within the federal prison system. This procedure included several stages, including two chances for the inmate to appeal an adverse decision.

The road to the Control Unit usually began with one or more violent disciplinary infractions at another facility. These infractions would lead to an investigation, a full disciplinary hearing, and some form of punishment. It is important to note that no person came to the Control Unit without a prior disciplinary determination, after notice and a hearing, that he had committed a violent disciplinary violation.

In some cases, typically involving a recidivist inmate, the Warden of the prisoner's institution concluded the prisoner presented a threat to the safety or stability of the institution. In that case, the Warden could refer the inmate to the Regional Office for consideration for placement at the Marion Control Unit. *See* 28 C.F.R. § 541.41(a) (2005). When making a referral, the Warden was obligated to consider several "factors." *Id.* at § 541.41(b). But "factor" is a misleading term—the Warden's discretion was essentially limited to consideration of any disciplinary violations during confinement and/or escape attempts.[2] *Id.* The referral

[2] Indeed, the warden was expressly prohibited from considering the nature of the offense for which the inmate was convicted (unless considered in conjunction with an escape or disciplinary infraction). 28 C.F.R. §

package included the Warden's written statement justifying the placement, the inmate's file, and a complete account of the underlying disciplinary infraction, including all investigative reports and disciplinary findings.

Upon receiving a referral, the Regional Office would convene a Committee to review the referral package. *Id.* at § 541.42(a). The Committee would ordinarily consist of three people, and usually included both the Regional Programs Manager and the Regional Correctional Services Administrator. The Committee would then convene a hearing with the inmate. *Id.* at §§ 541.43(a), 541.43(b)(3). The inmate would receive notice of the hearing at least 24 hours in advance, including a list "of the specific act(s) or other evidence which forms the basis for" the referral. *Id.* at § 541.43(b)(1). The Committee would provide the inmate with a representative to assist in presenting his case if he so desired. *Id.* at § 541.43(b)(2).

At the hearing, the inmate could present documentary evidence and could call witnesses. *Id.* at § 541.43(b)(4). At the end of the hearing, a written recommendation was prepared which provided "specific reasons for the decision, [including] a description of the act, or series of acts, or evidence on which the decision is based." *Id.* at §541.44(a)(2). The recommendation was given to the inmate as a matter of course, unless there were security reasons to justify confidential treatment. *Id.* at § 541.44(b). Both the Committee's recommendation and the underlying referral package would then be forwarded in writing to the Regional Director. *Id.* at § 541.44(c).

The Regional Director would decide whether to authorize placement at the Control Unit. In making this decision, the

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541.41(b)(6-7) (2005). Moreover, the warden was prohibited from referring "protective" cases or inmates with mental or physical disabilities. *Id.* at § 541.41(c)(1-2).

Regional Director could disregard either the Warden's referral, or the Committee's recommendation, or both. Overturning the Committee's recommendation was uncommon, however, and in the event of such a decision, a written explanation would be provided to the inmate. *Id.* at § 541.45(b). If the Regional Director determined that the inmate should be placed at the Control Unit, the inmate could appeal through the Bureau of Prisons' Administrative Remedy Process, in which case the final decision would ultimately be made by the BOP Office of General Counsel. *Id.* at § 541.45(c). The appeal, however, would not delay the inmate's transfer to the Control Unit, which would take place as soon as practicable after the Regional Director had made his decision.

Upon arrival at the Control Unit, the inmate would be assigned a "team," which usually consisted of three or more people, including myself. The team would meet with the prisoner almost immediately after his arrival. The purpose of this meeting was to orient the inmate to life in the unit. At the meeting, the inmate was informed what behavior was expected of him, what activities were acceptable, and what the criteria for release were. *Id.* at § 541.45(c-f). Most importantly, the team would inform the inmate how long he was to remain in the Control Unit. *Id.* at § 541.47(a). We would also explain to the inmate that the actual length of his stay in the unit may be substantially longer, depending on his behavior. The inmate knew that if he behaved, he would not spend one day at the Control Unit beyond what we had set for him when he arrived.

This was a critical part of life at the Control Unit. In my experience, almost any inmate – no matter how violent – can be managed without a lot of trouble if he understands three things: why he's there; how long he'll be there; and what it takes to get out. At the Control Unit, the inmate knew each of these things from the outset. He knew why he was there, the minimum length of time he would be at the unit, and what it

took for him to get out. In that way, he understood that his future was at least partially in his own hands, which provided an important protection against arbitrary enforcement, and an incentive for him to behave.[3]

Finally, there were two levels of ongoing review. First, the "teams" would meet with their assigned inmates at least every thirty days to address the inmate's progress. *Id.* at § 541.49(a). Additionally, the Executive Panel conducted an administrative review approximately every 60 days. *Id.* at § 541.49(d). The review provided an opportunity for inmates to appear before a panel that included the Assistant Director, the Regional Director, the Warden at Marion, myself, and the inmate's case manager. At this meeting, the inmate was free to air any grievance he may have about his treatment, including perceived unfairness in his discipline or the conditions of his confinement. The right to appear was given to every inmate in the unit, and in my experience about one third of the unit would attend each review.

In my experience, the whole system worked extremely well. There was a process in place, and we followed it. The inmates dealt with the reality of life in the unit, and the staff dealt with the due process. In addition, these procedures seem to correspond with what was ordered by the lower courts in this case. The district court ordered that the inmate be given notice, including all the grounds for the assignment to the supermax unit, *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1026 (N.D. Ohio 2002), that the inmate be allowed to present evidence and call witnesses, *id.*, that the proceedings be recorded, *id.*, that the inmate be given a written decision that informed him of the reasons for the decisions and were

[3] The average assignment was typically between 36-42 months. Even in extraordinary circumstances where the team decided that the inmate needed to spend the rest of his sentence in the unit, such decisions were made clear to the inmate. In no circumstance was the inmate left in the dark regarding the length of his stay at the unit.

not simply boilerplate, *id.* at 1027, that the inmate be allowed to appeal, *id.*, that any decisions made at the appellate level be written, *id.*, and that the inmate's status be reviewed once a year, *id.* at 1028. The Bureau of Prisons provided that process and more.

Given the rough equivalency of the process involved, it seems clear to me that the district court's order is neither burdensome nor unwieldy. In fact, procedures of this type make the administration of a supermax facility easier, not harder.

II. Procedural Protections Of The Sort Ordered By The Lower Courts Serve Important Penal Interests

The procedures ordered below serve important interests in the prison setting. First, making sure that the inmates in a control unit understand what it will take, in terms of both time and behavior, to be moved to a less restrictive facility is critical. In my experience, withholding this information from an inmate undermines his respect and regard for the prison staff and increases his resentment. An inmate in such a situation views his time in the Control Unit as arbitrary. On the other hand, an inmate who knows what is expected can learn to conform to the requirements of his confinement.

Put another way, up-front disclosure of what is needed to exit the unit creates an incentive for the inmate to behave, thereby reducing violence and chaos in the unit. An inmate who has no set expectations does not see value in good behavior. But an inmate who knows that he needs 40 months without an incident report will value his disciplinary status. The value of processes that allow for this sort of understanding, like those ordered by the courts below, cannot be overstated.

Second, the control unit facilities are a limited resource, and the correctional system has an interest in making sure that those spaces are reserved for the worst of the worst. The modest procedural requirements called for by the district court in this case – including notice to the prisoner, a meaningful opportunity for him to be heard in an open process, followed by a reasoned decision – helps to ensure that inmates who do not require administrative segregation stay in other facilities *and* that those who present the gravest threat are removed and segregated.

CONCLUSION

Because the process ordered by the district court is neither novel nor burdensome, and because it helps further important correctional goals, *amicus* asks that the Court affirm the decision below.

Respectfully submitted,

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